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No. 76-1203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

C. ORVIS SOWERWINE, Trustee in Bankruptcy,
REA EXPRESS, INC., *Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,
Appellees

ON APPEAL FROM A THREE-JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the railroad-appellees listed below move to affirm the decision of the three-judge court of the United States District Court for the Southern District of New York on the ground that it is manifest that the questions presented are so unsubstantial as not to need further argument.

STATEMENT

The underlying facts and procedural history of this case are described in detail in the decision of the court below and in the Report of the Interstate Commerce Commission of July 28, 1975.[1] These facts and history are briefly summarized below.

REA was created in 1929 as a wholly-owned joint venture of 86 railroads (including appellees) through which they would engage in the express business (348 I.C.C. at 168-81). Railroad ownership and control of REA were approved by the Commission under Section 5(2) of the Interstate Commerce Act. *Securities and Acquisition of Control of Railway Express Agency, Inc.*, 150 I.C.C. 423 (1929). At the same time, the Commission approved under Section 5(1) the pooling provisions of a standard express operations agreement (SEOA) between REA and the railroads, and approved under Section 20a the issuance by REA to the public of $32 million in bonds. *Id.* The Commission also authorized interlocking directors between the railroads and REA under Section 20a(12) of the Commerce Act after finding that "neither public nor private interests will be adversely affected" (348 I.C.C. at 176). Such interlocks, with requisite periodic Commission approvals, continued through 1968.

Under the uniform 1929 SEOA executed by REA and the railroads, including a number of "short line" non-

[1] The court's opinion is not yet published and is reprinted in the appendix to REA's jurisdictional statement at 1a-36a; references herein to that opinion will be cited to that appendix. Excerpts from the Commission's Report are printed in REA's appendix, and the Report is published in full at 348 I.C.C. 157; references herein to that Report will be to the official, complete publication.

shareholder railroads, REA was a non-profit agency. It first paid its own expenses out of its gross revenues and then paid what was left over to the contracting railroads as "rail transportation revenue" to provide compensation for the railroad's transportation services. On April 11, 1929, the REA board of directors adopted a resolution whereby REA would deduct from the payments owed to its railroad stockholders as rail transportation revenue an amount sufficient to pay the semi-annual principal payments on REA's public bonds. The deductions were to be treated as "advances" by the shareholder railroads to REA that would bear interest at 5¼ percent.[2] (Op. 2a-3a; 348 I.C.C. at 169-70, 179). The stockholding railroads accounted for approximately 98 percent of the express business. The April 11, 1929 resolution was prompted by a concern that had the payments on the public bonds been funded through deductions prior to computation of rail transportation revenue for all contracting railroads, that method "would have resulted in railroads whose services were disproportionately higher than their stock-holdings (in-

[2] REA's summary of the "material facts" erroneously suggests (pp. 6-7) that the advances should have been approved by the Commission under § 5(1) as an amendment to a pooling contract, that the April 11, 1929 resolution was inconsistent with the Commission's approvals in 1929, and that the resolution was inconsistent with the terms of the SEOA. Such contentions were made below and were expressly dealt with by the court and the Commission: no approval of the non-negotiable debt under 5(1) was required (Op. 26a); the resolution was consistent with and permitted by the Commission's 1929 order establishing railroad ownership and operation of REA—and indeed the Commission had advance knowledge that such a step would be taken prior to its decision furnishing approvals and authorizations under Sections 5(1), 5(2), 20a(2), and 20a(12) (Op. 25a; 348 I.C.C. at 205); and the advances resulted in a "valid debt" consistent with the contract of the parties (348 I.C.C. at 204).

cluding all the short lines) building up the equity of the stockholders through sinking fund payments. . . ." (Op. 3a-4a. See also 348 I.C.C. at 171-81).

REA's bonds were refinanced in 1938 by the issuance of notes to the public (Op. 4a). REA repaid the principal on the notes by again taking advances from its stockholders. The procedures for making the advances were set forth in identical "stockholders agreements." *Railway Express Agency, Inc., Notes,* 230 I.C.C. 478 (1938). The Commission's Director of Finance reviewed the "stockholder agreements" and advised that they did not require Commission authorization under Section 20a (Op. 4a; 348 I.C.C. at 183-84). Advances were made to REA by the stockholding railroads through 1948 pursuant to the April 11, 1929 resolution and the 1938 stockholders agreements, and resulted in the creation of an open account non-negotiable debt by REA to the railroads of approximately $28 million.[3]

In the years before 1959, although REA as a non-profit entity necessarily showed neither gain nor loss on its books, "there was a net annual multi-million dollar deficit from the cost to the railroads providing services

[3] REA suggests (pp. 6-7) that since the interest rate on the non-negotiable debt was higher than the rate on its public debt, the non-negotiable debt had a detrimental effect on REA. Similar arguments were made below and were rejected (Op. 17a, 20a). As a non-profit entity, with its residual revenues paid to the railroads after deduction of REA's own expenses (including interest), it made no practical difference to REA whether the interest rate was, say, 5% or 6%—any reduction in the interest rate would simply have resulted in a corresponding increase in the amounts otherwise payable to the railroads (348 I.C.C. at 183; Op. 17a). For like reasons, the advances had "little effect" on REA's ability to operate and "merely changed the form of [the railroads'] investment in REA from all stock to a combination of stock and debt" (Op. 20a).

and facilities to REA for express operations despite their revenues from REA" (348 I.C.C. at 189). REA was in effect a subsidized company with the railroads assuming the real and heavy financial burden of the express business (*Id.*). In an effort to achieve increased efficiency in the handling of express traffic, and to encourage a more commercial basis for the operations of REA, a new SEOA was adopted in 1959 under which REA would be able to earn profits or incur losses after 1961 (Op. 4a; 348 I.C.C. at 189-91). REA remained wholly owned by the railroads. At the same time, promissory notes totaling $27.6 million were issued by REA to the railroads to formalize and replace the non-negotiable debt. The notes required semiannual interest payments at 5 percent and the principal was due on December 31, 1973.

The Commission approved the new SEOA under Section 5(1) on September 21, 1959, *Express Contract, 1959,* 308 I.C.C. 545 (1959), and four days later authorized under Section 20a the issuance of the notes ("1959 notes") to the railroads as "for a lawful object," "compatible with the public interest," and "necessary and appropriate for and consistent with the proper performance by [REA] of service to the public as a common carrier" (348 I.C.C. at 191).

In 1969, REA was sold by the railroads to a new company, REA Holding Corporation, which had been formed by a group of REA executives. The purchase price was slightly more than $2 million, and the purchase agreement made express provision for repayment of the notes (Op. 5a; 348 I.C.C. at 191-92).

Under its new ownership, REA continued to make interest payments on the 1959 notes until September, 1971, when suit was brought by REA against its former

railroad owners (Op. 5a; 348 I.C.C. at 160). The complaint alleged *inter alia* that the 1959 notes had been issued in violation of Section 10 of the Clayton Act, 15 U.S.C. § 20, and generally sought damages with respect to the non-negotiable debt and 1959 notes, as well as a declaration that the notes were void.

The Commission intervened in the lawsuit and asked the court to stay the litigation so that the Commission might have an opportunity to reconsider the correctness of its 1959 order authorizing issuance of the notes. The three-judge district court granted the Commission's motion (Op. 7a; 348 I.C.C. at 162-64).

On January 9, 1973, the Commission reopened the 1959 proceeding in which it had approved the notes. Extensive discovery was conducted concerning the history and nature of the non-negotiable debt from as early as 1928, the circumstances concerning the issuance of the 1959 notes, and the financial relations between the railroads and REA. The parties then submitted to the Commission detailed and comprehensive briefs, verified statements, and exhibits covering a number of issues involving the non-negotiable debt and the 1959 notes (348 I.C.C. at 164-66).

On July 28, 1975, the Commission issued a 62-page Report that canvassed in great detail the facts and the legal issues raised by the parties (348 I.C.C. at 157-218). The Report concluded, *inter alia,* that the non-negotiable debt was a valid debt and not equity,[4] that REA's

[4] REA has not taken issue with this finding, which was affirmed by the court (Op. 30a-31a). Nonetheless, it persists in erroneously characterizing the debt, which was found to be precisely that, as "capital debt," or as "capital contributions." Such characterizations cannot efface the explicit finding of the Commission, after extended and comprehensive consideration, that in fact debt and not equity was involved (348 I.C.C. at 206).

"numerous allegations" of misrepresentations and omissions in the application for approval to issue the 1959 notes were "without any substantial basis," that the Commission's order of September 25, 1959 approving the issuance of the notes had been "correctly and appropriately issued," and that the issuance of the notes had been exempted from the operation of the antitrust laws under Section 5(11) of the Interstate Commerce Act[5] (348 I.C.C. at 206, 211-12, 218).

On February 18, 1975, REA filed for reorganization under Chapter XI of the Bankruptcy Law (Op. 7a). In an affidavit filed by REA's president when it entered reorganization in 1975 he attributed REA's difficulties to "the combined effect of double-digit inflation and the most severe recession since World War II" as well as to the limited availability of credit and similar problems.[6] On November 6, 1975 REA was adjudged a bankrupt and liquidation commenced.

REA sought review of the Commission's decision both in the Second Circuit and in the district court in which its damage action was pending[7] (Op. 9a). At the same time the railroads filed motions for summary judgment seeking dismissal of the damage complaint. The panel below, composed of Judges Friendly, Knapp and Griesa, sat as a three-judge district court and as a panel of the Second Circuit. In a unanimous decision writ-

[5] REA filed a petition for reconsideration with the Commission that was denied by the Commission on February 11, 1976 (Op. 8a; App. 108a-110a).

[6] This affidavit appears in the record below as Exhibit F to to the affidavit of April 28, 1975 of S. William Livingston, Jr.

[7] The unusual jurisdictional posture of this case is described in the court's opinion at 9a-10a.

ten by Judge Friendly, entered November 18, 1976, the district court granted the railroads' motion for summary judgment and dismissed the complaint, and dismissed REA's challenge to the Commission's 1959 order and 1975 Report [8] (Op. 33a-34a). Acting as a panel of the Second Circuit, the court also entered a *per curiam* order denying REA's challenge to the Commission's actions, adopting the reasons stated in Judge Friendly's decision of November 18 (Op. 36a).

ARGUMENT

This appeal is taken only from the court's decision concerning the validity of the Commission's initial order approving the issuance of the 1959 notes and the Commission's 1975 Report reaffirming the correctness of that order. (Apparently this does not purport to be an appeal taken from the district court's decision dismissing the damage complaint.) To overturn the

[8] Rule 58 of the Federal Rules of Civil Procedure provides that "[e]very judgment shall be set forth on a separate document." No such judgment has been entered on the court's decision of November 18. (There are still pending before the district court various counterclaims and motions.) This Court has held in a case involving an appeal under 28 U.S.C. § 1291 ("appeals from all final decisions of the district courts") that entry of judgment under Rule 58 is a prerequisite to taking an appeal. *United States* v. *Indrelunas*, 411 U.S. 216 (1973). The instant appeal, however, is taken pursuant to 28 U.S.C. § 1253, which permits direct appeals to this Court from "an order granting or denying . . . an interlocutory or permanent injunction in any civil action, suit or proceeding required . . . to be heard and determined by a district court of three judges." Since the court's opinion below may be regarded as an order denying an injunction and since *United States* v. *Indrelunas* does not concern itself with 28 U.S.C. § 1253, we assume that the instant appeal is not technically defective as a jurisdictional matter because of the absence of a judgment entered on a separate document.

decision of the Commission, REA was required to establish in the court below that the Commission's decision had no "rational basis" or was "arbitrary, capricious and erroneous because . . . not based upon any substantial evidence." *Chicago S.S. & S.B. R.R.* v. *United States*, 221 F. Supp. 106, 109 (N.D. Ind. 1963) (3 judge court); *see also City of New York* v. *United States*, 344 F. Supp. 929, 939-40 (E.D.N.Y. 1972) (3 judge court).

The jurisdictional statement alleges three grounds on which the court below erred in affirming the Commission. As discussed below, these grounds are all insubstantial and lack merit, and the court's decision should be summarily affirmed.

A. The Court Correctly Ruled That The 1959 Notes Were Not Issued In Violation Of Section 10 Of The Clayton Act

The court below held that Section 10 of the Clayton Act did not apply to the issuance of the 1959 notes because they were issued on a uniform basis to all of REA's stockholders. REA argues (pp. 11-14) that this holding was based on a "novel construction of Section 10" which "may emasculate public control of common carrier security issues," and that the decision was inconsistent with *Minneapolis & St. Louis Ry.* v. *United States*, 361 U.S. 173 (1959). Indeed, REA contends (p. 11) that dealings by a 100 percent stockholder with its wholly-owned subsidiary should be peculiarly the concern of Section 10 since in such a case there is no dissenting stockholder capable of pursuing private injunctive remedies. The contentions have no merit.

Section 10 makes it a criminal violation for a common carrier to "have any dealings in securities, supplies or

other articles of commerce" of more than $50,000 in one year with another corporation when there exist interlocking directors and officers between the carrier and the other corporation. 15 U.S.C. § 20. As a criminal statute, it is to be "construed strictly, not loosely," and it is "a rather narrow prohibition applicable to activity that is conceptually within the antitrust philosophy." *United States* v. *Boston & Me. R.R.*, 380 U.S. 157, 160, 162 (1965).

As the court below recognized, neither the legislative history of Section 10 nor its "evident purpose" have any application to the issuance of notes by a wholly-owned entity to all of its parents, on a uniform basis, to replace existing debt (Op. 29a). The legislative history indicates that Section 10's purpose was to deal with abuses occurring at the turn of the century by bankers and suppliers of railroads who were taking advantage of common directorships with railroads to mulct the carriers through unfavorable securities transactions or by selling supplies to carriers at exorbitant prices.[9] But the risk of illicit mulcting made possible through opportunities presented by an interlocking directorship is not a risk to be rationally apprehended where the totality of the owners of a carrier jointly act and deal on a uniform basis with their subsidiary for the purpose of replacing open account debt with notes. Any injury resulting from the conduct of all

[9] The legislative history is described in *Minneapolis & St. L. Ry.* v. *United States*, 361 U.S. 173, 190 (1959), *Cleary* v. *Chalk*, 488 F.2d 1315, 1321 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974), and *Klinger* v. *Baltimore & Ohio R.R.*, 432 F.2d 506, 516-17 (2d Cir. 1970). See also H. R. Rep. 627, 63d Cong., 2d Sess. 3 (1914); S. Rep. No. 698, 63d Cong., 2d Sess. 47-48 (1914); S. Doc. No. 584, 63d Cong., 2d Sess. 13-14 (1914).

the owners of a carrier is necessarily sustained by those supposedly inflicting it—no minority stockholders are injured. Under such circumstances the concern with mulcting of the carrier that underlies Section 10 is inapplicable. Moreover, it would be irrational to require the owners of a carrier either to deal with it only on the basis of competitive bidding or to sever the interlocks with their subsidiary. The relationships between all the owners of an entity acting uniformly and that entity do not constitute "activity that is conceptually within the antitrust philosophy" (See Op. 16a-17a). Accordingly, the court below properly concluded that Section 10 did not bar the issuance of notes by REA to its railroad parents to replace the prior debt without competitive bidding.

The court correctly concluded that there "is simply nothing to indicate that Congress meant [Section 10] to cover a securities transaction between a carrier and all its owners" (Op. 29a). A like result has been reached by the only other circuit to consider the question. *Cleary* v. *Chalk*, 488 F.2d 1315, 1322-24 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974).[10]

[10] The Commission early recognized that simple parent-subsidiary transactions are not "dealings" within the intent or literal meaning of Section 10. *Securities of Western Pac. R.R.*, 145 I.C.C. 750, 752 (1928). Since the Commission is given special responsibilities for enforcement of Section 10, the court below correctly noted that some weight also must be attached to the fact that it did not require the use of competitive bidding in the issuance of the notes (Op. 14a-16a, 30a). *See also*, *Borg* v. *International Silver Co.*, 11 F.2d 147, 150 (2d Cir. 1925) (a "dealing" in shares of stock "implies ordinarily a trade between two opposite parties, of which there was none here. The defendant was in substance both the transferor and the transferee").

REA places heavy reliance on this Court's footnote explanation in the *Minneapolis* case that the legislative history of the statute "suggests strongly" that it was "intended to cover only a carrier's dealings with related persons in its own securities." *Minneapolis & St. L. Ry.* v. *United States, supra,* at 190 n. 13. But it is clear that the phrase "related persons" was simply a reference to firms that had interlocking directors with the carrier. It was not, as REA implies, a reference to the totality of the carrier's stockholders. The *Minneapolis* case did not involve a parent-subsidiary relationship, and the Court's decision did not discuss the applicability of Section 10 in such circumstances. Moreover, the description in *Minneapolis* of the general purpose and scope of Section 10, far from being in conflict with the decision below, was quoted and expressly relied on by Judge Friendly (Op. 29a).

In addition to the ground relied upon by the court below, there is another reason why the relief sought by REA—invalidation of the Commission's order—was correctly denied. The Commission correctly held that immunity from Section 10 had been provided for by Section 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11), which exempts "from the operation of the antitrust laws" all transactions that are necessary to or in furtherance of a transaction approved by the Commission under Section 5 of the Act (348 I.C.C. at 212). *See Minneapolis & St. L. Ry.* v. *United States, supra.* This holding rested on a finding that the Commission's approval of the notes was in furtherance of a contemporaneous transaction (the 1959 SEOA) that was, at about the same time, approved under Section 5(1), so that the notes shared the latter's Section 5(11) immunity. Indeed, a finding of exemption from

Section 10 is particularly appropriate in this case, given the pervasiveness of regulatory control over the relationship between REA and its owners: total railroad ownership and control of REA under Section 5(2) was approved at the creation of REA, each director interlock was specifically approved by the Commission under 49 U.S.C. § 20a(12), and the issuance of the 1959 notes was, similarly, approved by an order of the Commission.[11]

Finally, there is, of course, neither pertinence nor substance to the contention (p. 14) that REA was somehow injured in 1959 through a violation of Section 10 because of the Commission's failure to consider the fact that the railroads did not accept an offer by Lehman Brothers to purchase REA and to repay the non-negotiable debt by having REA issue two-year notes to the railroads at 4 percent interest. If Section 10 were violated the vice must be shown to be in the absence of competitive bidding where it was required,

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[11] Appellees argued below that Commission approval under 49 U.S.C. § 5(2) of total railroad control, its approval of interlocking directors between REA and the railroads, and its pervasive regulation of the railroad-REA relationship all served to immunize or preempt from antitrust attack the issuance of the notes by REA in 1959. *See In re REA Express, Inc., Private Treble Damage Antitrust Litigation,* 412 F. Supp. 1239 (E.D. Pa. 1976); *Hughes Tool Co.* v. *Trans World Airlines, Inc.,* 409 U.S. 363 (1973). The Commission in its decision recognized that this was a "persuasive argument" but found it unnecessary to rule on the point because of the specific immunization resulting from its approval of the 1959 SEOA (348 I.C.C. at 217). The court did not rule on the immunity questions because of its conclusion that there were no antitrust violations, but took pains to point out it was *not* expressing disagreement with the "many serious arguments of the railroads, particularly those based upon . . . the antitrust immunity provision of § 5(11) of the Interstate Commerce Act, when read in the light of *Hughes Tool Co.* v. *Trans World Airlines, Inc. . . .*" (Op. 10a).

and not in the rejection of Lehman's offer to purchase the express business.[12]

B. The Commission Properly Applied The Standards Of Section 20a In Approving The Issuance Of The 1959 Notes

REA accuses the Commission and the court below of failing to perceive that Section 20a requires an investigation and a finding that an issuance of securities will be in the public interest before it can be approved. REA alleges (pp. 15-18) that the Commission should have considered alternatives to the notes such as preferred stock, and it claims that the notes "assured that REA would remain indefinitely in [a] capital starved condition," and contributed to its 1975 bankruptcy. These arguments have no substance and were properly rejected by the three-judge panel.

REA's argument misconceives the issue that was before the Commission when it was asked for approval to issue the notes. The question for the Commission was whether it was appropriate and in the public interest for an existing open account debt to be replaced on a dollar-for-dollar basis by long-term promissory notes. The notes did not increase the amount of the debt but merely fixed the terms for repayment.[13] As the court

[12] It should be noted that the Lehman offer to repay the non-negotiable debt was not, on the face of it, more favorable to REA than the 1959 notes. The difference in maturities (2 years compared to 14 years) provided ample justification for the modest difference in interest. Moreover, under the Lehman proposal, REA would have repaid the entire $27 million principal to the railroads in a two-year period—an event that has never taken place with respect to the 1959 notes.

[13] REA emphasizes (p. 18) that the notes were not subordinate to subsequent borrowings by REA. But this could have injured REA only by making it difficult for REA to borrow money. No claim of any such difficulty is advanced, and in fact the railroads did subordinate their notes when it was necessary to enable REA to borrow (Op. 4a).

below noted, the fixing of the terms of the debt by the issuance of the notes "afforded a significant benefit to REA" because the existing debt "apparently was payable upon demand" (Op. 32a). The Commission could not ignore the fact that REA had an existing debt obligation to the railroads; nor did the Commission have the option of requiring the issuance of preferred stock simply on the ground that this would have strengthened REA. Moreover, appellant is wrong in arguing (pp. 16-17) that "[a]bsent the note issue, REA's stockholders would have had to depend on REA's net earnings to recover their investment," since there was no such inhibition on the repayment of the non-negotiable debt.

Moreover, REA's allegations as to the supposedly adverse impact of the notes are without foundation. The annual interest requirement on the notes was less than $1.5 million, an expense that is insignificant in comparison with REA's annual gross revenues (which were regularly in the hundreds of millions of dollars during the sixties).[14] Nor is there any ground in the record for concluding that these payments injured "REA's ability to survive" or its "ability to serve the public" (p. 16), or that the notes "assured that REA would remain indefinitely in [a] capital starved condition." As the court below noted, Lehman Brothers in 1959 was willing to buy REA under an arrangement which required REA to pay off the entire principal of the debt within two years, a clear indication that it regarded "REA to be a viable enterprise" regardless of the debt (Op. 32a). Similarly, it was the inside managers of REA who purchased the company from

[14] Excerpts from REA's annual reports are included in the joint appendix (pp. 273-341) filed in the proceeding below in the Second Circuit.

the railroads in 1969, notes and all—again an unequivocal indication that the notes were not regarded as an intolerable burden on the business.

Nor is there any reason for crediting in any way appellant's naked assertion that the notes contributed to REA's bankruptcy in 1976. The court was plainly correct in holding that REA "simply has not demonstrated a relation" between the two (Op. 32a). The claim on its face is implausible. REA paid a total of $13 million in interest (p. 17) on the 1959 notes in the 1961-1970 period, and less than $3 million after its new owners took over in 1969. It stopped paying any interest on the notes in 1971 when it initiated its treble damage action. It did not pay the principal when it became due in 1973, and the principal has never been paid. In 1974, three years after REA made its last payment of interest on the notes, and five years after new ownership of REA, it achieved an operating profit of $2.8 million (Op. 32a). The affidavit filed by REA's president in 1975 when it entered reorganization contained no suggestion that REA's difficulties had resulted from the notes, and REA's problems were attributed to "the combined effect of double-digit inflation and the most severe recession since World War II," as well as to the limited availability of credit, and similar problems. Similarly, in a press release issued at the time of reorganization, REA again emphasized that "the effects of the recession has literally pulled the rug out from under our carefully planned recovery program and our cash position during the past two months has become critical."[15] The release contained no suggestion that the notes played any part in bringing on bankruptcy.

[15] The affidavit and the press release appear in the record below as Exhibits F and G to the affidavit of April 28, 1975 of S. William Livingston, Jr.

REA's criticism of the events of 1959 thus at best "amounts to condemnation by hindsight" (Op. 31a), suffers from a failure to establish any interrelationship with the events of 1975, and in no respect provides substance to the charge that the Commission's approval of the notes under Section 20a(2) to replace an existing, valid debt on a dollar-for-dollar basis was improper.

REA's reliance on *Denver & R.G. W. R.R.* v. *United States,* 387 U.S. 485 (1967) is misplaced. That case involved an approval under Section 20a of the issuance of stock which was the proposed first step in the control of REA by a competitor and indicated the necessity of some consideration of possible anti-competitive consequences. 387 U.S. at 492. No such circumstances existed in this case; the issuance of the 1959 notes to REA's existing owners did not involve a further acquisition which required antitrust analysis. Hence the standards established by the *Denver & Rio Grande* case eight years after the notes were issued are inapposite.[16]

C. There Was No Fraud On Creditors

REA's final point (pp. 18-22) is that the court below and the Commission erred in approving the issuance of notes in 1959 that were "meant to defraud REA's general creditors." This theory is apparently based on the contention that the non-negotiable debt was "capital surplus" intended to be "subordinate to REA's general

[16] The only "anti-competitive factor" referred to by REA in its brief (p. 17) was the supposed violation of Section 10 of the Clayton Act resulting from the issuance of the notes without competitive bidding. As the court below held, there was no such violation and, as the Commission held, any such violation was exempt from the antitrust laws pursuant to Section 5(11) of the Interstate Commerce Act.

obligations," and that it was a fraud on creditors to replace the debt with notes that were not subordinate to all of REA's existing and future creditors.

However, there was no evidence whatsoever in the proceedings below of any fraud on creditors.[17] The claim of fraud is based on the assertion that the non-negotiable debt represented stockholders' "capital claims," (pp. 4, 18) that could not be lawfully "converted" into promissory notes. But the question whether the non-negotiable debt represented a valid debt rather than equity or contributions to capital, was dealt with extensively both by the court and the Commission. Both concluded after an extensive review of the record that the non-negotiable debt was a valid debt and not a contribution to capital (348 I.C.C. at 203-06; Op. 30a-31a). No effort is made by REA to suggest any respect in which the analysis or the findings behind that conclusion were incorrect—it simply ignores them. Moreover, the issuance of the notes was approved in a public proceeding, and the existence of the notes was thereafter shown on REA's annual reports and its financial statements. There is no evidence that any creditors loaned money after 1959 in ignorance of the existence of the notes, or that prior creditors did not receive full repayment of their debt.

REA's attempt to portray the notes as a grasping effort by its stockholders to elevate their claims over those of other creditors is unhinged from reality. The notes were unsecured, and did not place liens on REA's assets. The notes by their terms were subordinate to

[17] The Commission rejected as unfounded REA's arguments that the 1959 approval had been induced by fraud and misrepresentations (348 I.C.C. at 212; 109a). No appeal on this point was made either to the court below or to this Court.

much of REA's existing debt. When subsequent lenders required subordination of the notes as a condition to further loans, far from seeking to maintain a preferred position among creditors, REA and the railroads in 1961 sought and obtained Commission approval to modify the 1959 order to permit the holders of the notes to subordinate them to new loans from outsiders to REA (Op. 4a). This conduct does not indicate fraud.

Finally, REA's invocation of this Court's decision in *Pepper* v. *Litton,* 308 U.S. 295 (1939) in no way assists an attack on the decision below. That case (which involved a request for rearrangement of the priorities of creditors and not, as here, a request for damages) was concerned with the power of a bankruptcy court to disallow or subordinate a claim of a controlling stockholder which is fraudulently advanced to defeat the claim of a creditor, and empowers the trustee to protect the interest of the creditor. The court below, of course, did not suggest that the trustee lacks such power, or that fraud on creditors is to be sanctioned. Instead the court below found that there had been no breach of fiduciary duties when the notes were issued (Op. 33a), and both it and the Commission in extensive opinions concluded that the notes had validly been issued. Further, as explained at page 16, *supra,* there was no connection between the issuance of the notes and REA's bankruptcy sixteen years later, and no basis for an inference that a claim had been fraudulently advanced in 1959 to defeat the expectations of creditors in 1975.

D. There Is No Basis For Granting A Petition For A Writ Of Certiorari

REA requests that its jurisdictional statement be treated as a petition for a writ of certiorari in the event that the Court does not believe that the decisions below are subject to direct appeal.

There are no grounds for the issuance of a writ. The decision below is not in conflict with a decision of any other Court of Appeals, nor is there any suggestion of such conflict. As shown above, there is no basis for believing that the decision is in conflict with prior decisions of this Court or that there has been a complete departure below "from the accepted and usual course of judicial proceedings." Rules of the Supreme Court, Rule 19(1)(b).

Moreover, the circumstances of this case are highly atypical, involving a transaction between a non-profit entity and all its parents, which took place over a decade before it was challenged, all subject to the review and approval of the Interstate Commerce Commission. The issues presented for review are sui generis and there are thus no "special and important reasons" requiring review in this Court.

CONCLUSION

For the reasons stated above, the judgment of the court below should be affirmed. Alternatively the petition for certiorari should be denied.

Respectfully submitted,

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April 20, 1977

LIST OF RAILROAD-APPELLEES

Alabama Great Southern Railroad Company
The Atchison, Topeka and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
Bangor & Aroostook Railroad Company
Burlington Northern, Inc.
Canadian National Railway Company
Central of Georgia Railroad Company
The Chesapeake and Ohio Railway Company
Chicago and Eastern Illinois Railroad Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago and North Western Railway Company
Cincinnati, New Orleans and Texas Pacific Railway Company
Clinchfield Railroad Company
The Colorado & Southern Railway Company
Delaware and Hudson Railway Company
The Denver and Rio Grande Western Railroad Company
Fort Worth and Denver Railway Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
The Kansas City Southern Railway Company
Lake Superior & Ishpeming Railroad Company
Louisville & Nashville Railroad Company
Maine Central Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
Norfolk and Western Railway Company
Pennsylvania Coal Company
Richmond, Fredericksburg and Potomac Railroad Company
St. Louis-San Francisco Railway Company
St. Louis Southwestern Railway Company
St. Louis Southwestern Railway Company of Texas
Seaboard Coast Line Railroad Company
Soo Line Railroad Company
Southern Pacific Transportation Company
Southern Railway Company
Spokane, Portland & Seattle Railway Company
Texas and Pacific Railroad Company
Union Pacific Railroad Company
Western Maryland Railway Company
The Western Railway of Alabama
The Western Pacific Railroad Company